

*American Zurich Ins. Co. and Zurich American Ins. Co. v.
J. Crisman Palmer and GPNA*

*William P. Fuller
December 20, 2022*

*Audrey M. Barbush, RPR
audrey@paramountreporting.com
605.321.3539*

RR paramount
reporting

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EXHIBIT

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<p>1 faith cases in South Dakota and what you've done.</p> <p>2 A All right.</p> <p>3 Q Have you defended bad faith cases in which you've</p> <p>4 submitted an answer without including an affirmative</p> <p>5 defense?</p> <p>6 A Yes, I have.</p> <p>7 Q And why would you do that?</p> <p>8 A Because there was no applicable affirmative defense to</p> <p>9 assert.</p> <p>10 Q Have you defended bad faith cases without pursuing</p> <p>11 offensive discovery?</p> <p>12 A I have.</p> <p>13 Q Again, why would you strategically do that?</p> <p>14 A In many instances, if I get a bad faith case that comes</p> <p>15 in and I review it, I review the file, the claim file,</p> <p>16 and the available information, and I can see at the</p> <p>17 outset that this is not good, that ultimately if this</p> <p>18 were tried, we're going to lose and we could lose big,</p> <p>19 and my goal at the outset is to try to get it settled</p> <p>20 as quickly as possible. And in that situation, I will</p> <p>21 talk to plaintiffs counsel about mediation and see if</p> <p>22 we can mediate it as quickly as possible; and if for</p> <p>23 some reason mediation is not acceptable to plaintiffs</p> <p>24 counsel, to try to get it settled without a mediator.</p> <p>25 And sometimes I'm successful in doing that. But I know</p>	<p>1 to compel, ends up paying attorneys' fees -- the</p> <p>2 plaintiffs attorneys' fees on the discovery issue, and</p> <p>3 in my opinion -- and this is, you know, not a</p> <p>4 mathematical computation, but I think your stock, my</p> <p>5 stock goes down in front of that judge if I fight what</p> <p>6 I know is a losing battle on discovery.</p> <p>7 BY MR. SUTTON:</p> <p>8 Q Bill, I'm going to hand you what's previously been</p> <p>9 marked as Exhibit 58, and I'm going to represent to you</p> <p>10 that this is a draft answer that -- or excuse me. Let</p> <p>11 me start over. I'm going to represent to you that this</p> <p>12 is a proposed amended answer that was filed in the</p> <p>13 Leichtnam bad faith case, and what I'd like you to do</p> <p>14 is to turn to page 9 of that document, 9 in the bottom</p> <p>15 numbers, 10 in the top numbers.</p> <p>16 A So turn to page 9.</p> <p>17 Q Correct, where it says "Separate and Affirmative</p> <p>18 Defenses." Are you there?</p> <p>19 A Right.</p> <p>20 Q Now, there is a proposed affirmative defense,</p> <p>21 paragraph 1, Failure to Exhaust Administrative</p> <p>22 Remedies. I want to ask you, based on your experience</p> <p>23 in defending bad faith cases, as well as your knowledge</p> <p>24 of the defense of the underlying comp case, once the</p> <p>25 settlement agreement was approved by the department in</p>
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<p>1 that if I don't get it settled right away, that in most</p> <p>2 instances, as more discovery -- and discovery is</p> <p>3 extensive in bad faith in South Dakota. It takes a lot</p> <p>4 of time, and it costs a lot of money. And usually it</p> <p>5 doesn't help me; it helps the plaintiff. And so at the</p> <p>6 end, we spend a lot of money on discovery, and we end</p> <p>7 up paying even more money trying to get it settled a</p> <p>8 year and a half after the lawsuit has been started.</p> <p>9 Q Based on your experience in defending bad faith cases</p> <p>10 in front of the federal district court judges in</p> <p>11 South Dakota, would you have any concerns in pursuing</p> <p>12 offensive discovery if your client has not responded</p> <p>13 fully to the discovery requests from the defendant and</p> <p>14 is facing a motion to compel?</p> <p>15 MR. HOYT: Objection. Vague, incomplete.</p> <p>16 THE WITNESS: Yes, I would have concerns. My</p> <p>17 concern is that I know the federal judges are very</p> <p>18 aggressive in compelling the insurance companies to</p> <p>19 open their books, so to speak, and provide</p> <p>20 broad-ranging information and documents, and I know,</p> <p>21 and you can read numerous decisions from the federal</p> <p>22 magistrates and the federal judges, where the judges</p> <p>23 are not favorably disposed to the insurance company's</p> <p>24 withholding of documents or information. And so, in</p> <p>25 many instances, the insurance company loses the motion</p>	<p>1 the Leichtnam comp case, do you believe that there was</p> <p>2 any additional steps that the plaintiff needed to do to</p> <p>3 exhaust their administrative remedies before pursuing a</p> <p>4 bad faith claim?</p> <p>5 MR. HOYT: Objection. Foundation, calls for legal</p> <p>6 conclusion.</p> <p>7 THE WITNESS: I don't think there was anything</p> <p>8 further that needed to be done.</p> <p>9 BY MR. SUTTON:</p> <p>10 Q Why do you say that?</p> <p>11 A Because --</p> <p>12 MR. HOYT: Same objection.</p> <p>13 THE WITNESS: Because the settlement agreement --</p> <p>14 and more importantly, which was approved by the</p> <p>15 Department of Labor -- in essence, is a final judgment</p> <p>16 and, in essence, is an exhaustion of administrative</p> <p>17 remedies.</p> <p>18 BY MR. SUTTON:</p> <p>19 Q In order for there to be an exhaustion of</p> <p>20 administrative remedies, do you have an opinion as to</p> <p>21 whether there must be a statement in the settlement</p> <p>22 agreement that benefits were wrongfully denied?</p> <p>23 MR. HOYT: Same objections.</p> <p>24 THE WITNESS: I don't believe that's necessary.</p> <p>25</p>

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<p style="text-align: right;">Page 45</p> <p>1 BY MR. SUTTON:</p> <p>2 Q Have you ever seen a settlement agreement signed in a</p> <p>3 comp case, in your experience, either defending bad</p> <p>4 faith cases or defending comp cases, where there was an</p> <p>5 acknowledgment that benefits were wrongfully denied?</p> <p>6 A Not in my experience.</p> <p>7 Q Would you anticipate ever recommending your client</p> <p>8 agree to that language?</p> <p>9 A No.</p> <p>10 Q Why not?</p> <p>11 A Well, it's admitting that you've basically engaged in</p> <p>12 wrongful conduct.</p> <p>13 Q Are you aware of bad faith cases that have proceeded in</p> <p>14 South Dakota based upon a settlement agreement approved</p> <p>15 by the Department of Labor rather than an adjudication</p> <p>16 following a hearing?</p> <p>17 A Run that question by again.</p> <p>18 Q Yeah. Do you have knowledge of bad faith cases in</p> <p>19 South Dakota that have been filed when there's only</p> <p>20 been a settlement of the workers' compensation claim</p> <p>21 rather than a hearing in which the Department of Labor</p> <p>22 determines that benefits were denied?</p> <p>23 A Yes. I'm aware of cases. Correct.</p> <p>24 Q And is that an unusual proposition, that you see a</p> <p>25 settlement and then the bad faith claim?</p>	<p style="text-align: right;">Page 47</p> <p>1 MR. HOYT: Same objections.</p> <p>2 BY MR. SUTTON:</p> <p>3 Q What's that opinion?</p> <p>4 A The release --</p> <p>5 MR. HOYT: Same objections.</p> <p>6 THE WITNESS: The release would not have been a</p> <p>7 valid defense in the bad faith lawsuit.</p> <p>8 BY MR. SUTTON:</p> <p>9 Q Why do you say that?</p> <p>10 A Because it was never the understanding in the work comp</p> <p>11 proceeding that Mr. Leichtnam was releasing a potential</p> <p>12 subsequent bad faith lawsuit. That was never my</p> <p>13 intention from the outset, and Denny Finch had concerns</p> <p>14 about language that could be construed in that way and</p> <p>15 wanted that language removed. Which I did.</p> <p>16 Q The fifth affirmative defense, statute of limitations,</p> <p>17 identified on page 10 of Exhibit 58. Do you know, off</p> <p>18 the top of your head, Bill, when the limitations period</p> <p>19 commences or accrues in a bad faith case based upon</p> <p>20 denial of work comp benefits?</p> <p>21 MR. HOYT: Objection. Incomplete, vague.</p> <p>22 THE WITNESS: I believe it would commence at the</p> <p>23 time of the wrongful denial.</p> <p>24 BY MR. SUTTON:</p> <p>25 Q Do you know what the limitations period is governing</p>
<p style="text-align: right;">Page 46</p> <p>1 A No.</p> <p>2 Q I'd like you to turn to page 10 of Exhibit 58, please,</p> <p>3 Bill. There is a third affirmative defense,</p> <p>4 res judicata. Do you see that?</p> <p>5 A I do.</p> <p>6 Q Based upon your knowledge of the work comp settlement</p> <p>7 and your knowledge in defending bad faith cases, do you</p> <p>8 have an opinion as to whether there was a successful</p> <p>9 res judicata defense that could be asserted in this bad</p> <p>10 faith case?</p> <p>11 MR. HOYT: Objection. Foundation, calls for legal</p> <p>12 conclusion.</p> <p>13 THE WITNESS: Yes.</p> <p>14 BY MR. SUTTON:</p> <p>15 Q What is that opinion?</p> <p>16 A Res judicata did not apply. The issues in the work</p> <p>17 comp case are different from the issues in the bad</p> <p>18 faith litigation.</p> <p>19 Q The fourth affirmative defense, release. Based upon</p> <p>20 your work in defending the work comp case, as well as</p> <p>21 your other work in other bad faith cases, do you have</p> <p>22 an opinion as to whether release would have been a</p> <p>23 successful affirmative defense in this case, the bad</p> <p>24 faith case?</p> <p>25 A I do.</p>	<p style="text-align: right;">Page 48</p> <p>1 bad faith cases in South Dakota?</p> <p>2 A I believe it's six years.</p> <p>3 Q Now, when the bad faith case was first commenced, did</p> <p>4 you have a phone call with Cris Palmer?</p> <p>5 A I did.</p> <p>6 Q And do you recall -- well, what do you recall being</p> <p>7 discussed during that phone call? Let's do it that</p> <p>8 way.</p> <p>9 A I think I said to him that, you know, obviously it's</p> <p>10 his call, but advice of counsel would not be a good</p> <p>11 defense in the bad faith.</p> <p>12 Q Why did you communicate to Attorney Palmer that you did</p> <p>13 not think advice of counsel would be a good defense?</p> <p>14 A Because that would open up all of my communications to</p> <p>15 Zurich about the medical issue and my concerns about</p> <p>16 the denial of medical benefits.</p> <p>17 Q Do you recall anything else from that discussion with</p> <p>18 Attorney Palmer?</p> <p>19 A I really don't. I probably talked to him about</p> <p>20 something else, but I can't recall what it was.</p> <p>21 Q Do you recall having any other conversations with</p> <p>22 Attorney Palmer at any time about the bad faith case?</p> <p>23 A Well, I recall during the bad faith mediation --</p> <p>24 apparently, there was a mediation that occurred, you</p> <p>25 know, relatively soon after the lawsuit was started,</p>